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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re J.M., a Person Coming Under the  
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

K.B.,

Defendant and Appellant.

E056270

(Super.Ct.No. RIF1100104)

OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Clare M. Lemon, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Pamela J. Walls, County Counsel, Anna M. Deckert, Deputy County Counsel,  
for Plaintiff and Respondent.

No appearance for Minor.

Defendant and appellant K.B. (Mother) appeals from the juvenile court's orders (1) denying her petition to modify a court order related to her son, J.M. (Welf. & Inst. Code, § 388),<sup>1</sup> and (2) terminating her parental rights to J.M. (§ 366.26). First, Mother contends the juvenile court erred by denying her petition to modify a court order, because Mother established (1) her circumstances had changed, and (2) it would be in J.M.'s best interests to vacate the termination hearing and reinstate reunification services. Second, Mother asserts the juvenile court erred by terminating her parental rights because the court should have applied the parent-child bond exception. (§ 366.26, subd. (c)(1)(B)(i).) We affirm the judgment.

## **FACTUAL AND PROCEDURAL HISTORY**

### **A. DETENTION**

J.M. was born in July 2008. On January 24, 2011, when J.M. was two years old, J.M. suffered a “a severe break to his upper right arm, a cut near his left eye, and some discoloration on [the] left side of [his] face.” J.M. was taken to the emergency room. The Riverside County Department of Public Social Services (the Department) was contacted.

Mother told the Department her babysitter, J.R. (the babysitter), contacted her at work to inform her J.M. fell off a bed and could not move his arm. A physician told the Department that Mother's explanation for the injury was questionable and seemed suspicious. A further examination of J.M. revealed “multiple pattern bruises on his

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<sup>1</sup> All subsequent statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

inner right thigh, resembling belt buckle and loop marks, approximately four or five months old [and] multiple scratch marks on his upper back, which were lighter in color and appeared to also be old injuries, as the[y] were healed.” Although a doctor believed the arm fracture could have been an accident, the bruises “were conclusive for physical abuse.” Mother believed the inner thigh bruises were possibly (1) a rash from J.M. wetting the bed, or (2) insect bites. Mother believed the scratches on J.M.’s back were caused by a friend’s dog. Mother denied using corporal punishment and she instructed the babysitter to not use corporal punishment. The Department took custody of J.M.

On January 26, 2011, the Department filed a petition alleging (1) J.M. suffered serious physical harm while in Mother’s custody (§ 300, subd. (a)); (2) J.M. was at substantial risk of suffering serious physical harm due to Mother’s failure to supervise and protect J.M. (§ 300, subd. (b)); (3) J.M. was a child under the age of five who suffered severe physical abuse while in Mother’s custody (§ 300, subd. (e)); and (4) R.M., J.M.’s father (Father), cannot be located (§ 300, subd. (g)).

At the detention hearing, the juvenile court found a prima facie case had been made for all the allegations. The court ordered J.M. continue to be placed in the Department’s custody. The court ordered the Department to provide Mother with reunification services. The court ordered visitation between Mother and J.M. a minimum of two times per week.

#### B. JURISDICTION/DISPOSITION

A blood test revealed J.M. suffered liver trauma during the January 24 incident. A doctor believed the trauma was likely the result of J.M. being punched or kicked in

the abdomen. The babysitter denied spanking J.M., and said Mother also did not hit J.M. The babysitter told a Department employee J.M. was injured when the babysitter threw J.M. up in the air, but failed to catch him. The babysitter believed the marks on J.M.'s thighs were caused by a neighbor who took care of J.M. for a brief period. When speaking to a detective, the babysitter admitted burning J.M.'s legs with a cigarette lighter in August 2010. The babysitter was arrested and charged with willfully injuring a child. (Pen. Code, § 273a.)

Mother told a Department social worker that she “made some bad choices” in selecting babysitters for J.M. Mother worked as a security guard, but lost her job when she left work on January 24 to go to the hospital. J.M. was excited to see Mother during visits and sad to see Mother leave at the end of visits. A Department social worker described J.M. as “very attached to his mother.”

Mother took a drug test on February 10, 2011, which reflected positive results for amphetamines. Mother admitted using methamphetamines three times since J.M. was removed from her custody. Mother said she consumed the drugs because “it is hard having [J.M.] out of the home.” Mother was attending parenting classes and individual counseling.

The juvenile court sustained the petition, finding J.M. (1) was at substantial risk of suffering serious physical harm (§ 300, subd. (b)); (2) was a child under the age of five who suffered severe physical abuse (§ 300, subd. (e)); and (3) had been left without any provision for support by his alleged father (§ 300, subd. (g)). The juvenile court ordered J.M. continue to be placed outside of Mother's custody.

C. SIX-MONTH STATUS REVIEW

Mother had a temporary job that ended in June 2011. On July 21, 2011, J.M. was placed in his maternal aunt's home, in Long Beach. Mother seemed to love J.M. "immensely as evidenced by her consistent visitation and loving interaction with him"; however, Mother continued using methamphetamines. Mother admitted suffering a substance abuse problem and not being compliant with her drug treatment program. Mother was discharged from her treatment program, and was in the process of enrolling in a second program. Mother "routinely missed drug testing dates from March 2011 through June 2011." J.M. enjoyed his visits with Mother and cried at the end of the visits.

On September 6, 2011, the juvenile court found returning J.M. to Mother's custody would place the child at substantial risk of suffering harm. The court terminated Mother's reunification services. The court reduced Mother's visits to one time per month, but authorized Mother and J.M.'s aunt to schedule additional visits.

D. TERMINATION AND REQUEST TO CHANGE A COURT ORDER

J.M. enjoyed living with his aunt, and they appeared to be developing a "strong bond." J.M.'s aunt wanted to adopt J.M. Father was located, but was incarcerated. Mother visited J.M. one or two times per week; the visits went well and they appeared to have a "healthy bond." On her own, Mother completed a 45-day detoxification program at Our House Substance Abuse Program in October 2011. Mother participated in an outpatient substance abuse treatment program for approximately one month until she was voluntarily discharged from the program. At the end of January 2012, Mother

enrolled in a six-month inpatient substance abuse treatment program. Mother was expected to complete the program in July 2012.

On March 8, 2012, Mother filed a request to change a court order. (§ 388.) Mother asserted circumstances had changed because she (1) completed a residential drug treatment program, (2) completed parenting classes, and (3) regularly visited J.M. Mother requested the juvenile court (1) reinstate reunification services, and (2) vacate the hearing scheduled for termination of her parental rights. Mother contended the changed orders would be in J.M.'s best interests because (1) Mother regularly visited J.M., (2) Mother visited J.M. once or twice per week, (3) the visits have been appropriate, (4) J.M. enjoys visiting Mother, and (5) J.M. has a healthy bond with Mother.

In an "Addendum Report," the Department argued the juvenile court should deny Mother's request to change a court order because Mother "has been addicted to methamphetamines for an extensive period of time," and "has been in and out of treatment facilities and continues to be in treatment at this time." The Department asserted Mother was not stable enough to care for J.M.

At a hearing on May 7, 2012, the Department asserted Mother's circumstances were changing, but had not yet changed. The Department argued Mother had not yet completed her substance abuse treatment program. Further, the Department asserted it was in J.M.'s best interests to stay with his aunt because he was three years old and had been living with her for approximately 10 months—"a large part of his life." The Department argued Mother had failed to demonstrate "any kind of stability." The

Department asserted Mother was “still trying to get her life back together,” and it would not be in J.M.’s best interests to delay the termination of parental rights. Minor’s attorney submitted on the issue of the section 388 petition.

The juvenile court found Mother was “making an effort to change her circumstances,” but that “her circumstances ha[d] not yet changed to such a degree to justify changing the current court order.” The juvenile court further found it would not be in J.M.’s best interests to change the court order because (1) J.M. had been living with his aunt for almost 10 months; (2) J.M. was bonded to his aunt; (3) Mother had a history of substance abuse and relapse; and (4) Mother did not effectively deal with her drug issues during the instant case. Thus, the juvenile court denied Mother’s request to change a court order. (§ 388.)

In regard to terminating Mother’s parental rights, Mother requested the court (1) create a legal guardianship for J.M, or (2) apply the parent-child bond exception. Mother argued the Department’s reports reflected frequent visits between Mother and J.M., that they have a healthy bond, and J.M. enjoys visiting Mother.

The juvenile court found there was not a substantial possibility of J.M. being returned to Mother’s custody within six months, and a sufficient basis existed for terminating parental rights based on the September 6, 2011, hearing when reunification services were terminated. Further, the court found none of the exceptions to termination were applicable, and that a plan of adoption would be in J.M.’s best interests. The juvenile court terminated Mother’s and Father’s parental rights to J.M.

## DISCUSSION

### A. REQUEST TO CHANGE A COURT ORDER

Mother contends the juvenile court erred by denying her request to change a court order (§ 388) because she proved her circumstances had changed and the change would be in J.M.'s best interests. We disagree.

Under section 388, a parent may petition a juvenile court to modify a previous order on the grounds of changed circumstances. (§ 388; *In re Nolan W.* (2009) 45 Cal.4th 1217, 1235.) The petitioner has the burden to show, by a preponderance of the evidence, a change of circumstances, and to show that the proposed modification is in the child's best interests. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228; Cal. Rules of Court, rule 5.570(h)(1).) "We review the grant or denial of a petition for modification under section 388 for an abuse of discretion. [Citations.]" (*In re B.D.*, at p. 1228.)

The juvenile court's finding that Mother's circumstances had not changed was within reason because Mother was still participating in an inpatient drug treatment program. Mother had an "extensive history" of drug use, and continued abusing drugs after the Department took custody of J.M. Thus, Mother's sobriety was new, and she had not shown she could maintain her sobriety outside of a treatment program. Given this evidence, it can reasonably be concluded Mother was making progress in dealing with her substance abuse issues; however, she had not sufficiently changed the drug abuse issue.

In regard to the second prong, the best interests of the child are determined by considering (1) the seriousness of the problem that led to the dependency; (2) the

strength of the parent-child bond; and (3) whether the problem that led to the dependency has been resolved, or the ease with which it may be resolved. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685.)

The problem that led to the dependency was serious in that Mother's poor selection of caretakers for J.M. led to J.M. suffering a broken arm, burns, and liver trauma. The Department concluded J.M. and Mother had a "healthy bond." J.M. enjoyed seeing Mother during her visits. It appears the problem that led to the dependency had not been resolved because Mother was still dealing with drug abuse issues at the time of the section 388 hearing; the hearing was in May, and Mother was scheduled to complete her inpatient drug treatment in July. It can be inferred that Mother's poor decisions regarding J.M.'s care were influenced by her drug abuse. Thus, the juvenile court could reasonably conclude the problems would not be easily resolved, as Mother had previously relapsed. Given the foregoing assessment, it was reasonable for the juvenile court to conclude a change to the court orders was not in J.M.'s best interests. Accordingly, we conclude the juvenile court did not err.

Mother asserts the problem that led to the dependency was serious because Mother did not protect J.M. from his abusive babysitter, but Mother highlights the facts that she did not physically abuse J.M. and she had loving visits with J.M. We do not find Mother's argument to be persuasive because she is not merely a victim of a poor babysitting choice. It is Mother's active and affirmative abuse of methamphetamine that led to her poor choices of caretakers for J.M. Given that Mother was still in treatment for her drug abuse at the time of the section 388 hearing, the juvenile court

could reasonable conclude the problem that led to the dependency was serious and could not be easily resolved.

Next, Mother asserts “substance abuse was not the primary problem” in this case. Mother argues the Department was not aware of her substance abuse issues until she admitted, one month after J.M. was removed, to using methamphetamine. We do not find Mother’s argument to be persuasive because, as the Department noted, “[M]other has been addicted to methamphetamines for an extensive period of time which has led to her making poor decisions in her life, endangering the health and safety of her child and resulting in the removal of her child.” In other words, Mother’s drug use is at the root of the problem—it causes her to make poor caretaking decisions for J.M. As a result, Mother’s drug use is part of the primary problem in the case.

#### B. TERMINATION

Mother contends the juvenile court erred by terminating her parental rights because the court should have applied the parent-child bond exception. (§ 366.26, subd. (c)(1)(B)(i).) We disagree.

If a juvenile court finds a dependent child is adoptable, then it will terminate parental rights unless one of the statutorily enumerated exceptions is applicable. (§ 366.26, subd. (c)(1).) One of the enumerated exceptions provides that parental rights shall not be terminated if “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) We review the juvenile court’s decision to not apply the parent-

child bond exception for an abuse of discretion.<sup>2</sup> (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449.)

The first requirement for the parent-child bond exception is that Mother maintain regular visitation with J.M. The record reflects Mother regularly visited J.M. every week. Thus, the first requirement of the exception is satisfied.

We now turn to the second prong of the exception—the benefit to the child from continuing the relationship. “The benefit to the child from continuing such a relationship must . . . be such that the relationship “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” [Citation.]” (*In re Aaliyah R., supra*, 136 Cal.App.4th at p. 449.)

The record reflects J.M. was three years old, and had lived with his aunt for approximately 10 months of his life. J.M. developed a “strong bond” with his aunt, and vice versa. J.M. also had a good relationship with a school-aged cousin who resided with his aunt. As set forth *ante*, Mother has an extensive history of drug abuse; she continued abusing drugs after J.M.’s removal, and was still working through an

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<sup>2</sup> Mother contends the substantial evidence standard of review should be applied to this issue. There appears to be a split of authority as to which standard of review is applicable to a decision to not apply the parent-child bond exception. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425 [Fourth Dist., Div. Three applied the substantial evidence standard]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 [Fourth Dist., Div. One applied the substantial evidence standard].) In the “standard of review” section of Mother’s opening brief, she describes the burden of proof as “a preponderance of the evidence.” We choose to follow the precedent of *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351, which explained the abuse of discretion standard is applicable because “[t]he juvenile court is determining which kind of custody is appropriate for the child[, and s]uch a decision is typically review[ed] for abuse of discretion.”

inpatient treatment program at the time of the termination hearing. Given the unstable nature of Mother's sobriety, the juvenile court could reasonably conclude the sense of permanency J.M. would gain from being adopted by his aunt outweighed the benefit of continuing the relationship with Mother. Accordingly, we conclude the juvenile court did not err.

Mother asserts the juvenile court erred because the record reflects J.M. would be harmed by severing his relationship with Mother. We agree that severing the legal parent-child relationship is harmful; however, that is not the issue. The issue is one of balancing: does the benefit of a permanent home with adoptive parents provide a greater benefit to the child than continuing the relationship with the biological parent? In this case, the juvenile court could reasonable conclude the greater benefit would be derived from adoption, because Mother's sobriety was too unstable to ensure a positive relationship with J.M. In sum, we find Mother's argument to be unpersuasive.

### **DISPOSITION**

The judgment is affirmed.

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MILLER

J.

We concur:

RAMIREZ

P. J.

KING

J.